IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-83,459-01

EX PARTE BRANDON DANIEL

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS FROM CAUSE NO. D-1-DC-12-201718-A IN THE 403RD DISTRICT COURT TRAVIS COUNTY

***Per curiam*. ALCALA, J., concurred.**

O R D E R

This is an application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071.

In the early morning hours of April 6, 2012, applicant drove his motorcycle to a Walmart store. Several store employees testified that applicant appeared to be intoxicated. Fearing for applicant's safety, a store employee called the police to keep applicant from driving while intoxicated. Uniformed police officer Jaime Padron responded to the call. Upon locating applicant, Padron told applicant that he was from the Austin Police

Department and added, "[S]top, I need to talk to you." Applicant then began running for the front exit. Padron tackled applicant and they fell to the ground. After hearing an initial gun shot, a Walmart employee witnessed applicant put a gun to Padron's neck and fire a second shot. When Walmart employee Lincoln LeMere jumped onto applicant to stop him, applicant fired a third shot, barely missing LeMere's ear. After employee, Archie Jordy, disarmed applicant, applicant raised his head and looked at Padron. Applicant then laughed and said, "I killed a cop."

In February 2014, a jury found applicant guilty of the offense of capital murder of a peace officer. At punishment, the jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant's punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Daniel v. State*, 485 S.W.3d 24 (Tex. Crim. App. 2016).

Applicant presents eleven allegations in his application in which he challenges the validity of his conviction and resulting sentence. The trial court did not hold an evidentiary hearing, and entered findings of fact and conclusions of law and recommended that the relief sought be denied.

This Court has reviewed the record with respect to the allegations made by applicant. Claim 2 is barred because statutory violations are not cognizable on habeas review. *See Ex parte Graves*, 70 S.W.3d 103, 116-17 (Tex. Crim. App. 2002); *Sadberry v. State*, 864 S.W.2d 541, 542 (Tex. Crim. App. 1993). Claims 3, 4, 5, and 7 are all procedurally barred because

habeas is not a substitute for matters which should have been raised at trial or on direct appeal. *Ex parte De La Cruz*, 466 S.W.3d 855, 864 (Tex. Crim. App. 2015); *see also Ex parte Townsend*, 137 S.W.3d 79, 81 (Tex. Crim. App. 2004) (holding that even a constitutional claim is forfeited if the applicant had an opportunity to raise the issue on appeal). Further, due process claims based on the Texas constitution are not cognizable on habeas. *See Ex parte Dutchover*, 779 S.W.2d 76, 77 (Tex. Crim. App. 1989).

In claim 1, applicant contends that his trial counsel were ineffective for the following reasons: failure to investigate and prepare the mitigation case, failure to suppress applicant's inadmissible oral statements, agreement to work on applicant's death penalty case under a flat fee structure, failure to challenge the constitutionality of Texas Penal Code section 8.04, failure to object to inadmissible victim impact evidence during the guilt/innocence phase, failure to object to improper arguments at both the guilt/innocence and punishment phases, failure to object to inadmissible hearsay testimony, failure to retain an expert on prison classification, and failure to explain to the jury why applicant was writing down the names of correctional officers. Applicant fails to meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984). He fails to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. *Id.* at 689.

Also in claim 1, applicant argues that his trial counsel were ineffective for failing to investigate and present evidence that applicant has Autism Spectrum Disorder (ASD).

Applicant presents an affidavit on habeas from one of his trial experts, psychiatrist Dr. Harold Scott, in which Scott revises his diagnosis to include ASD. Again, applicant can not meet his burden under *Strickland*.

The record shows that the entire defense team, consisting of four doctors and a mitigation specialist, considered whether applicant has Asperger's syndrome or another disorder within the autism spectrum. Trial counsel specifically investigated whether a credible diagnosis could be made in this case. Dr. Scott and psychologist Dr. William Lee Carter both interviewed and completed evaluations of applicant. Dr. Scott indicated that applicant probably did not suffer from Asberger's. Dr. Carter firmly believed that applicant did not suffer from ASD. Mitigation specialist Lisa Lawrence investigated and gathered mitigation and early childhood information regarding applicant. Trial counsel provided that information to the mental health professionals on the defense team.

Trial counsel did not fail to investigate whether applicant suffered from ASD. Trial counsel determined, based upon the investigation of applicant's background and opinions of the mental health experts, that a diagnosis of ASD was not supported.

At trial and punishment, trial counsel presented substantial evidence of applicant's mental health issues, related substance abuse issues, and social impairment that were determined to be verified by evidence from applicant's background and mental health experts. Trial counsel relied upon the opinions of their four mental health experts in developing a credible defense and presented expert testimony at trial regarding applicant's

mental health issues and substance abuse problems and how such issues affected his behavior and how such issues affected his statements to police.

Unlike in *Ex parte LaHood*, 401 S.W.3d 45 (Tex. Crim. App. 2013), where defense counsel failed to inquire into LaHood's mental status despite obvious indicators that it was an issue, trial counsel here made a reasonable investigation into possible mental health issues affecting applicant, including ASD. Counsels' decision not to present evidence of a possible ASD diagnosis was objectively reasonable in light of the evidence of applicant's social and mental health history, and his experts' opinions. Further, applicant fails to show that there is a reasonable probability that the result of this proceeding would have been different with the presentation of a possible ASD diagnosis.

In claim 6, applicant claims that his due process rights were violated when the State failed to disclose evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, applicant alleges that the State failed to disclose that it promised Louis Escalante a reduced sentence in exchange for his testimony at applicant's trial. However, applicant must do more than state mere conclusions of law or allegations of error; applicant must support his claim with adequate facts. *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985). Applicant fails to do so here and the evidence before us contradicts his allegation that a deal ever existed.

In claims 8 through 11, applicant challenges the constitutionality of various aspects of Texas Code of Criminal Procedure Article 37.071: the constitutionality of the "10-12"

rule, that the first special issue is unconstitutionally vague, that the punishment phase jury instructions restricted the evidence the jury could determine as mitigating, and that Texas's capital punishment scheme is arbitrarily imposed. These claims have been repeatedly rejected by this Court and applicant raises nothing new to persuade us to reconsider those holdings. *See Davis v. State*, 313 S.W.3d 317, 354-55 (Tex. Crim. App. 2010)("10-12" rule, arbitrarily imposed capital punishment scheme); *Coble v.State*, 330 S.W.3d 253, 297 (Tex. Crim. App. 2010)(vague first special issue, restriction of evidence that can be considered mitigating).

Based upon the trial court's findings and conclusions and our own review, we deny relief.

IT IS SO ORDERED THIS THE 18th DAY OF OCTOBER, 2017.

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